Md Halim bin Kadri v Public Prosecutor

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 42–20 OF 2002
JEFFREY TAN J
30 JANUARY 2004

Criminal Procedure — Sentence — Appeal against sentence — Interference by an appellate court — Whether trial court applied wrong principle in assessment of sentence — Whether sentence manifestly excessive or unsuitable — Firearms (Increased Penalties) Act 1971 s 8, Arms Act 1960 s 8(a), Penal Code s 34

The appellant pleaded guilty to offences under s 8 of the Firearms (Increased Penalties) Act 1971 and s 8(a) of the Arms Act 1960, both read with s 34 of the Penal Code. The trial court sentenced the appellant to seven years imprisonment and six strokes of the rotan in respect of the first offence, and $3^1/_2$ years imprisonment in respect of the second offence and ordered the sentences to run concurrently. The appellant appealed against the sentences.

Held, dismissing the appeal:

(1) The trial court had considered the public interest, the personal factors of the accused, and the plea of guilt. In particular, the trial court had considered the seriousness of the offences, and the need to protect the public. In the considered opinion of the trial court, there was no alternative to a deterrent sentence. And in the considered opinion of the court, the trial court had not imposed any sentence that was manifestly excessive or unsuitable to the proved facts and circumstances (see para 7).

(2) Unlawful possession of a firearm and/or ammunition is a most serious offence. The public must be protected. Like-minded offenders must be deterred. Suffice it to say that the trial court had not applied any wrong principle in the assessment of its sentences (see para 7).

[**Bahasa Malaysia summary**

Perayu mengaku salah terhadap kesalahan-kesalahan di bawah s 8 Akta Senjatapi (Penalti Lebih Berat) 1971 dan s 8(a) Akta Senjata 1960, kedua-dua dibaca dengan s 34 Kanun Keseksaan. Mahkamah bicara menjatuhkan hukuman tujuh tahun penjara dan enam kali rotan ke atas perayu terhadap kesalahan pertama dan 3½ tahun penjara terhadap kesalahan kedua dan telah memerintah kedua-dua hukuman dijalankan serentak. Perayu merayu terhadap hukuman-hukuman tersebut.

Diputuskan, menolak rayuan:

(1) Mahkamah bicara telah mempertimbangkan kepentingan orang awam, faktor-faktor peribadi tertuduh, dan pengakuan salahnya. Terutamanya, mahkamah bicara telah mempertimbangkan keberatan kesalahan-kesalahan tersebut dan juga keperluan melindungi orang awam. Setelah berfikir mendalam, mahkamah bicara berpendapat bahawa, tidak terdapat

alternatif selain dari menjatuhkan hukuman yang merupakan langkah pencegahan. Dan mahkamah ini juga, setelah berfikir mendalam, berpendapat bahawa mahkamah bicara tidak menjatuhkan hukuman yang jelasnya berlebihan atau tidak sesuai dengan fakta-fakta yang terbukti dan hal keadaan (lihat perenggan 7).

(2) Milikan senjatapi dan/atau peluru hidup yang menyalahi undang-undang adalah kesalahan yang sangat besar. Orang awam mesti dilindungi. Pesalah-pesalah serupanya mesti dicegah. Memadai berkata bahawa mahkamah bicara tidak memakai prinsip yang salah dalam penilaian hukuman-hukumannya (lihat perenggan 7).]

Notes

For cases on appeal against sentence, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2516–2538.

For the Firearms (Increased Penalties) Act 1971 and the Arms Act 1960 see generally 11 *Halsbury's Laws of Malaysia.*

Cases referred to

Ang Chai Seng v PP [2000] 2 MLJ 35 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
R v Kenneth John Ball 35 Cr App R 164 (refd)

Legislation referred to

Arms Act 1960 s 8(a)
Firearms (Increased Penalties) Act 1971 s 8
Penal Code s 34

Appeal from: Criminal Trial No 62-04 of 2002 (Sessions Court, Johor)

Appellant in person.
Haslinda bte Abu Bakar (Attorney-General's Chambers) for the respondent.

Jeffrey Tan J:

[1] This is the appellant's appeal against the sentences of seven years imprisonment and six strokes of the rotan in respect of the first offence, and three and half years imprisonment in respect of the second offence passed by the Sessions Court, Batu Pahat, on the respondent for the following offences:

Bahawa kamu bersama-sama, pada 6 Januari 2002 jam lebih kurang 5.50pm di belakang rumah No PHS 26, Jalan Parit Jorak Senawi, Tongkang Pechah, didalam daerah Batu Pahat, di dalam Negeri Johor telah memiliki sepucuk pistol jenama SIG Sauer P230SL No Siri S 012556 dengan menyalahi undang-undang, oleh yang demikian itu kamu bersama-sama telah melakukan satu kesalahan yang boleh dihukum di bawah s 8 Akta Senjatapi (Penalti Lebih Berat) 1971 dan dibacakan bersama di bawah s 34 Kanun Keseksaan.

A Bahawa kamu bersama-sama, pada 6 Januari 2002 jam lebih kurang 5.50pm dibelakang rumah No PHS 26, Jalan Parit Jorak Senawi, Tongkang Pechah, di dalam daerah Batu Pahat, di dalam Negeri Johor telah memiliki 25 butir peluru hidup 9MM tanpa lessen yang sah, oleh yang demikian itu kamu bersama-sama telah melakukan satu kesalahan yang boleh dihukum di bawah s 8(a) Akta Senjatapi 1960 dan dibacakan bersama di bawah s 34 Kanun Keseksaan.

B **[2]** It is discerned that those sentences of the trial court are well within the permitted range of sentences. All the same, an appellate court may disturb those sentences.

[3] In *Civil and Criminal Appeals in Malaysia* by Tan Kee Heng at pp191–192:

C

... the appellate court is ready to interfere with the sentence imposed by the trial court upon proof of one or more of the following circumstances: (a) The sentence imposed by the trial court was manifestly excessive or inadequate, (b) There is a manifest error either in law or in considering the facts and circumstances of the case, (c) The sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances, (d) The trial court has given undue weight to some of the evidence, (e) The trial court, in fixing the sentence, had failed to adequately consider all the relevant factors either for or against the offender, (f) The sentence was wrong in law. (g) The unsatisfactory features of the proceedings in the lower court (h) The charge has been hanging over the accused's head for a considerable period, (i) Justice does not appear to have been done.

D

E

[4] Yet it is a firmly established principle that an appellate court would be slow to disturb the sentence imposed by the lower courts unless the sentence is excessive to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles then this court will intervene *(R v Kenneth John Ball* 35 Cr App R 164). According to Hashim Yeop Sani J (as he then was) in *PP v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257G: 'It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence' (see *Ang Chai Seng v PP* [2000] 2 MLJ 35 per Haidar JCA, as he then was). And the Court of Appeal in *Ang Chai Seng* reiterated what was said by the Federal Court in *Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83, at p 84:

F

G

... this court has said it again and again that it will not normally interfere with sentences, and the probability or even the possibility, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference. For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion.

H

[5] In *Bhandulananda Jayatilake,* the Federal Court per Raja Azlan Shah Ag LP (as HRH then was) imparted the following guide:

I

Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial

discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [[1952] AC 525]). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient per se to warrant this court's interference.

[6] The latter is still the guide to follow (see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193, where the Federal Court expressed its full agreement with *Bhandulananda Jayatilake*).

[7] In the instant case, the trial court had considered the public interest, the personal factors of the accused, and the plea of guilt. In particular, the trial court had considered the seriousness of the offences, and the need to protect the public. In the considered opinion of the trial court, there was no alternative to a deterrent sentence. And in the considered opinion of this court, the trial court had not imposed any sentence that was manifestly excessive or unsuitable to the proved facts and circumstances. Unlawful possession of a firearm and or ammunition is a most serious offence. The public must be protected. Like-minded offenders must be deterred. Suffice it to say that the trial court had not applied any wrong principle in the assessment of its sentences. This appeal is therefore dismissed.

Application dismissed.

Reported by Geetha Radhakrishnan